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IN THE

Supreme Court of the United States

No. 252

OCTOBER TERM, 1959

JOSEPH D. MASTERSON,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S REPLY BRIEF

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CITATIONS.

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I.

In order to focus on the essentials, we believe it is necessary to state the key points in the instant case that are not controverted by petitioner in his Petition for Writ or Reply Brief:

(1) At no time prior to verdict, did petitioner urge that his positive identification of the cause of his injuries should be disregarded, as a basis for invoking *res ipsa loquitur*.

(2) Petitioner is unable to point to a single word in petitioner's testimony at variance with his counsel's pre-trial assurances to the Trial Judge with respect to peti-

tioner's positive identification of the object which struck him.

(3) Petitioner's testimony and that of his neuro-psychiatric expert coincide with his counsel's pre-trial statements (8a, 9a, 21a) that plaintiff knew, but at first could not recall what struck him, by reason of "retrograde amnesia". Now petitioner has reversed himself, and argues in effect that his initial inability to identify the flying object resulted not from amnesia but from faulty observation.

(4) Petitioner does not dispute the fact that his case was submitted to the jury under the Safety Appliance Act solely on the basis of his own testimony, nor that the Trial Judge correctly ruled in petitioner's favor that if petitioner was struck by a brakeshoe, as claimed by him, it would constitute a violation of the Safety Appliance Act for which respondent would be absolutely liable. Likewise, petitioner does not contend that he would be entitled to recover under the Safety Appliance Act if the jury disregarded his testimony, since there was not a scintilla of other evidence in the case pointing to a Safety Appliance Act violation. But because the jury disbelieved him, petitioner chooses to ignore the obvious conclusion that if his testimony were as equivocal as now claimed, petitioner should never have been permitted to go to the jury under the Safety Appliance Act in the first place.

II.

However, the key to petitioner's main argument is reiterated at page 1 of his Reply Brief:

> "Petitioner asserts that there was no definitive agreement or assurance at pre-trial anent the theory upon which the case was to be tried."

In our Brief in Opposition, at pages 9 and 10, it has already been emphasized that at pre-trial petitioner's counsel sought a favorable ruling on his contention that the mere breaking of a brakeshoe constituted a violation of the Safety Appliance Act—a legal issue without precedent. This was evident by his offer to prove "*if need be*, that this breaking of a brakeshoe was occasioned by a worn out condition of the brakeshoe * * *", which offer was never followed up by proof.

Once having obtained the Trial Judge's assurance that petitioner's case would come under the Safety Appliance Act if positive identification of the flying object as a piece of brakeshoe were made, petitioner's counsel—with petitioner present—categorically stated that such positive identification would be forthcoming, and that negligence had nothing to do with petitioner's case.

Could anything be more unequivocal than the following statements by petitioner's counsel at 21a:

> "Mr. Gaines: If the jury believes that it was a piece of a brake shoe which struck him, the plaintiff gains nothing by establishing negligence when the court charges that is a violation of the Safety Appliance Act. All one does in those circumstances is to clutter up a record. *I think the Supreme Court is right when it observes that if it be a Safety Appliance Act case then negligence has no place in this whole matter.*
>
> *If the jury disbelieves him, if this was not a piece of a brake shoe, he must fail, patently.*
>
> The Court: O. K.
>
> Mr. Illig: That is what it amounts to.
>
> Mr. Gaines: Do I make myself clear?
>
> The Court: He makes positive identification of its being a brake shoe.
>
> Mr. Gaines: That is right. He doesn't say it was anything else."

However, in his Reply Brief, petitioner has completely ignored the foregoing statements and instead quoted what

immediately follows. In short, the ensuing comments by the Trial Judge, quoted by petitioner in his Reply Brief, pertain to a hypothetical situation different from that already stated by petitioner's counsel with respect to the testimony to be given by petitioner.

Not only did petitioner's counsel categorically state at pre-trial that he preferred to go ahead under the Safety Appliance Act alone, but conversely, he at no time contended, as he does now, that *res ipsa loquitur* was also in issue. And it cannot be overemphasized that petitioner's actual testimony concerning the cause of his injury was no less positive and definite than his counsel had assured the Trial Judge it would be.

The pre-trial conference has been hailed as one of the best innovations of Twentieth Century Law. By way of illustration, Mr. Justice Brennan in a June, 1957, article published in the American Bar Association Journal Volume 43, page 499, said.

> "In pre-trial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sporting theory of justice."

If that be true, then disappointment in an adverse verdict cannot justify petitioner in subsequently attempting to maneuver into a position previously abandoned by him—by repudiating the positive pre-trial assurances given to the Trial Judge.

A most persuasive authority upholding respondent's position in this regard is *Barry vs. Reading Company* (D. C. N. J.) 3 F. R. D. 305, affirmed (C. A. 3d) 147 Fed. 2d 129, certiorari denied at 324 U. S. 867, 65 S. Ct. 912.

There, as here, action was brought under the Federal Employers' Liability Act and the Safety Appliance Act.

At a pre-trial conference, plaintiff's counsel specifically stated that the facts in the case were not in dispute except as to whether the hand brake on the railroad car was defective and that this question was the only issue in the case. At the conclusion of the trial, plaintiff's counsel asked the Court to charge that decedent was entitled to be provided with a reasonably safe place in which to perform his work, relying on certain testimony given by a fellow employee of decedent. The Court refused to so charge, stating that the issue involved in the case was whether the hand brake was ineffective and inefficient and that the jury had been told that there was an absolute duty on the part of the defendant to provide effective and efficient hand brakes on its railroad cars. Plaintiff's counsel took exception to this refusal to charge and it was this point which was emphasized in plaintiff's motion for new trial following a verdict for defendant.

Plaintiff contended that negligence should have been charged for defendant's failure to provide decedent with a reasonably safe place to work and that recovery for such negligence was possible under the FELA even though there was no finding of an ineffective hand brake.

In his opinion refusing plaintiff's motion for new trial, Judge Forman (recently elevated to the Court of Appeals for the Third Circuit) said:

> "To set aside the verdict of the jury and permit a new trial on the basis of the contentions of the plaintiff would be to completely nullify the purpose and effect of the Federal Rules of Civil Procedure with respect to pleadings and pre-trial procedure."

What Judge Forman subsequently commented in his opinion is likewise most pertinent here:

"Plaintiff's present complaints are rather complete afterthoughts never contemplated at seasonable times during the trial."

For the foregoing reasons, the respondent prays that the writ of certiorari be denied.

Respectfully submitted,

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